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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD OSMAN,

Plaintiff and Respondent,

v.

CYPRUS SHORE COMMUNITY
ASSOCIATION,

Defendant and Appellant.

G041174

(Super. Ct. No. 30-2008-00106884)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila B. Fell, Judge. Reversed with directions.

Daley & Heft, Lee H. Roistacher, Robert H. Quayle and Christopher M. Busch, for Defendant and Appellant.

Call, Jensen & Ferrell, Wayne W. Call, Mark L. Eisenhut and Julie R. Trotter, for Plaintiff and Respondent.

Cyprus Shore Community Association appeals from an order that denied its special motion to strike the malicious prosecution complaint of Richard Osman. It argues Osman failed to offer sufficient evidence to show a probability he will prevail on the merits. We agree and reverse.

FACTS

Osman owns a residence in Cotton Point Estates, a San Clemente community.¹ Cyprus Shore is an adjoining community, managed by Cyprus Shore Community Association (collectively, Cyprus Shore). Calle Ariana runs between the two. On Osman's side of the street lies a landscaped area kept up by Cotton Point, over which it has a maintenance easement.

Cyprus Shore contends the landscaped area extends from Calle Ariana to an old perimeter wall that once surrounded an estate (owned by Richard Nixon) later developed into Cotton Point Estates. Osman contends it covers only a three-foot strip extending from Calle Ariana to his lot line. We shall refer to the overall disagreement as covering the "disputed area," and the specific claims as a broader one to the "landscaped area" and a narrower one to the "three-foot strip."

In 2006, a long-simmering dispute over the landscaped area culminated in Cyprus Shore suing Osman, several neighbors along Calle Ariana, and Cotton Point Homeowners Association (Cotton Point). Osman and the neighbors filed cross-complaints against Cyprus Shore. Ultimately, Cyprus Shore entered into a settlement with one of the neighbors (the Arndts). It paid the Arndts \$200,000 and dismissed its action against all defendants, including Osman, in return for dismissal of the Arndt's cross-complaint.² About a week later, Cyprus Shore settled with Osman, paying him \$100,000 in return for dismissal of Osman's cross-complaint. Osman then commenced the instant malicious prosecution action against Cyprus Shore. We turn to the details.

¹ The facts are drawn from the pleadings and the evidence submitted on the special motion to strike.
² Cyprus Shore apparently had settled with the other defendants before the Arndt settlement.

Cotton Point Estates lies on a portion of tract 10909 as shown on the maps of Orange County. It includes lot C of tract 10909, which runs from the center line of Calle Ariana to Osman's lot line (and that of two adjoining neighbors). The area in dispute, be it the landscaped area or three-foot strip, is a part of Cotton Point Estates' lot C. Cyprus Shore lies on tract 4202, which is adjacent to tract 10909.

In 1984, Cotton Point and Cyprus Shore entered into a maintenance agreement that included the disputed area ("1984 agreement"). The agreement recited Cotton Point's predecessor in interest had granted Cyprus Shore "easements for ingress and egress for vehicular and pedestrian traffic over . . . lot C." (Presumably the access easement was over the Calle Ariana portion of lot C, although this is not spelled out). It provided, in relevant part, the two communities would share maintenance, landscaping, and tree trimming along Calle Ariana, with each undertaking that responsibility on its side of the street. The maintenance agreement was recorded.

In September 2003, Osman purchased a lot in Cotton Point. In a declaration in support of the anti-SLAPP motion, Osman explained he commissioned a survey, which confirmed the lot extended to the three-foot strip, and boundary markers were laid out. In early 2006, Osman began construction of his home with the erection of a construction fence inside of the boundary markers. Shortly after the fence went up, several members of Cyprus Shore entered Osman's property, "ripped down the fencing, threatened my contractors and promised to return with a 'sledgehammer.'" Osman called the sheriff. A deputy sheriff responded and spoke to the intruders, after which they left. Osman declared the deputy sheriff said he had advised the Cyprus Shore residents they would be arrested as trespassers if they returned.

According to a declaration from the president of Cyprus Shore (Robert Adams), Osman put up his construction fence on May 1, 2006. In doing so, he demolished the old perimeter wall, which "formed a natural barrier between the communities." Adams said the area outside the wall was "partially located on land . . .

owned by [Osman] and three of his neighbors, but Cotton Point had a landscape . . . easement on this land” The area was a “green belt. . . consistently used by myself and other . . . members of Cyprus Shore as [a] common area for various purposes including walking, playing ball, recreation, walking dogs, etc.” Adams believed Osman was subject to the 1984 agreement and his fence interfered with maintenance of the disputed area. “It was with this information available to me that Cyprus Shore filed [an action] on May 2, 2006 against Cotton Point and Richard Osman.”

Cyprus Shore’s complaint named as defendants Cotton Point, Osman, Arndt, and two other neighbors along Calle Ariana. It alleged the disputed area “has been used by various members of Cyprus Shore for recreational purposes, for walking dogs, and . . . it serves as a quasi-common area for the members of Cyprus Shore and has always been used as such.” Osman and Arndt had both fenced portions of the disputed area, destroying landscaping and denying members of Cyprus Shore access to the area. It alleged “[t]he construction of the improvements in the [disputed area], and the failure by Cotton Point to remove them . . . is a breach of the Cotton Point CC&R’s, and a breach of the [1984] contract between Cotton Point and Cyprus Shore.” Causes of action were set out for breach of contract, declaratory relief, and an injunction to compel Osman and Arndt to remove their fencing, restore the landscaping, and to compel Cotton Point to enforce its CC&R’s.

Adams further declared “[a]fter the complaint was filed, we had a meeting on May 24, 2006 with the homeowners in Cyprus Shore to discuss the use of the [disputed area].” Adams said “numerous homeowners . . . advised us . . . they had used the [disputed area] for more than five years . . . without permission from the owners, for various recreational uses, including walking dogs [and] playing ball In addition, I had used the area . . . for more than five years without permission from [Osman] or the previous owner.” Cyprus Shore engaged attorneys to investigate the possibility of a

prescriptive easement claim. After conducting legal research, the attorneys advised Cyprus Shore had a cause of action to establish a prescriptive easement.³

On its own, Cyprus Shore also concluded it had a good claim to a fee simple title to the three-foot strip. Adams declared Cyprus Shore examined a 1967 recorded deed from the developer of its community (Capri Builders, Inc.) that included Calle Ariana, and the map of tract 4202 showed the street was 40 feet wide. He measured the existing street, found it was only 34 feet wide, assumed the mapped street extended beyond the curb, and decided Cyprus Shore owned the three-foot strip.

In October 2006, Cyprus Shore filed an amended complaint. Two key allegations were added. First, Cyprus Shore alleged it owned Calle Ariana, which extended three feet beyond the curb of the existing street. (In technical terms, Cyprus Shore claimed lot C [Calle Ariana] was a part of its tract 4202.) Second, it alleged the area between existing Calle Ariana and the old Nixon perimeter wall stretched beyond the three-foot strip, and the entire area [the landscaped area] had been used continuously for more than 5 years by Cyprus Shore residents for “recreational purposes.” Six new causes of action were set out. They were: (1) quiet title in fee simple to the three-foot strip; (2) quiet title to a prescriptive easement in the landscaped area outside the old Nixon perimeter wall; (3) quiet title to a prescriptive easement in the three foot strip; (4) trespass (on the easement, however wide); (5) ejectment (from both areas); and (6) an injunction. On the trespass claim, both compensatory and punitive damages were requested.

Osman responded with a cross-complaint against Cyprus Shore, as did Arndt. Osman set out causes of action for nuisance, trespass, interference with an access easement over Cyprus Shore roads to reach Osman’s property, intentional infliction of emotional distress, declaratory relief, and an injunction. Arndt pleaded claims for

³ Appellate counsel for Cyprus Shore is not the firm that advised on the prescriptive easement claim.

nuisance and trespass. The facts alleged are not germane to the instant anti-SLAPP motion, but one can get some flavor of them from Osman's declaration in support of the anti-SLAPP motion, to which we return.

Osman declared that after Cyprus Shore commenced litigation, it instructed security guards to stop and search vehicles operated by Osman and his wife, and the guards did so, claiming to be looking for "contraband materials." One time, "the security guard terrified my wife by searching her minivan with a flashlight as she attempted to drive home from work at night." Cyprus Shore's manager told Osman he had been instructed to deny contractors access to Osman's lot. On one occasion, Osman watched as the manager used a golf cart to block cement trucks bound for Osman's property, forcing them to detour off the road and over Osman's site, which caused "tens of thousands of dollars" damage.

Osman said two Cyprus Shore directors "used their motor vehicles to run me and my 3-year-old daughter off the road as we were bicycling." One "publicly urge[d] another motorist to run me over." The same individual publicly threatened to call child protective services to have Osman's daughter taken away, and "regularly hounded and intrusively photographed me and my young daughter as we walked and bicycled within Cotton Point property." Cyprus Shore also moved to conduct a psychiatric examination of both Osman and his pregnant wife [to examine them on the emotional distress cross-claims] and, although the motion was denied, his wife suffered a miscarriage.

In April 2007 Cyprus Shore dismissed its fee simple claim (first cause of action). Adams declared "at some point in the litigation" Cyprus Shore discovered it did not own all of Calle Ariana, so dismissed this claim. No further explanation was offered as to when Cyprus Shore made the discovery. In September 2007, Cyprus Shore dismissed its claims for a prescriptive easement over the three-foot strip, trespass, and ejectment (the third, fourth, and fifth causes of action). What remained were the claims

for a prescriptive easement in the landscaped area outside the old Nixon perimeter wall, and an injunction (the second and sixth causes of action). Trial was scheduled for late October 2007.

On October 11, 2007, at a hearing before a settlement judge, Cyprus Shore and Arndt agreed on the record to a settlement. In a nutshell, Cyprus Shore agreed to dismiss its amended complaint against Arndt and Osman and pay Arndt \$200,000,⁴ and Arndt agreed to dismiss his cross-complaint.⁵

Adams declared he never doubted the merit of Cyprus Shore's case, but it settled because the litigation became too expensive. He said Arndt and Osman were both lawyers who "used aggressive litigation tactics to wear us down." Cyprus Shore had budgeted \$277,500 for the litigation, fees had gone over that to \$450,000 in legal fees, and "it could not afford to continue to litigate." So, he said it settled to avoid the expense of trial and an appeal even if it prevailed. Adams said Arndt had demanded the case against Osman be dismissed as part of the settlement.

On October 12, 2007, Cyprus Shore made an offer to compromise and allow Osman to enter judgment against it for \$100,000 on his cross-complaint. The offer was accepted and judgment entered for Osman accordingly.

The instant malicious prosecution action by Osman against Cyprus Shore was commenced in May 2008. It alleged the gist of the facts set out above and averred the prior action terminated in Osman's favor, was brought without probable cause, and was motivated by malice.

Cyprus Shore's special motion to strike argued the action was based on its exercise of its right to free speech and Osman could not show a probability of prevailing

⁴ The \$200,000 consisted of \$180,000 from Cyprus Shore and \$20,000 from insurers for two of its directors, Jeff Kudla and Mike Vogel.

⁵ Osman moves for judicial notice of Cyprus Shore's request to dismiss the action, without prejudice, filed September 14, 2007. He recognizes it was not admitted in evidence, but characterizes that as an oversight. Cyprus Shore opposes the motion, arguing it is unfair to consider evidence it did not have the opportunity to address below. Since the dismissal was not in evidence, the motion for judicial notice is denied.

on the merits. Osman's opposition contended he made such a showing. The relevant evidence offered on the motion was as set out above. After requesting supplemental briefing on the issues of favorable termination and the advice of counsel defense, the trial court denied the motion without comment.

DISCUSSION

Cyprus Shore argues Osman failed to show a probability of success on the favorable termination element of malicious prosecution, so the motion should have been granted. We find the argument convincing.

A cause of action is subject to dismissal on a special motion to strike if it arises from an act by a person in furtherance of his right of petition or free speech, unless the plaintiff shows a probability of success on the merits. (Code Civ. Proc., § 425.16.) The plaintiff's burden is to offer facts which, if proved, would support a judgment in his favor. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417.) We exercise our independent judgment in reviewing the record. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1396.)

The cause of action in question here is one for malicious prosecution. A plaintiff suing for malicious prosecution makes a prima facie case by showing there was a prior action brought (1) by defendant against plaintiff that terminated in plaintiff's favor, (2) without probable cause, and (3) with malice. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871.)

"In order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit.' [Citation.] [¶] If the termination does not relate to the merits – reflecting on neither the innocence or nor responsibility for the alleged misconduct – the termination is not favorable in the sense it would support a subsequent action for malicious prosecution. [Citation.]" (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341-342.) Put otherwise, "termination is

favorable when it reflects ‘the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant.’ [Citations.]” (*Camarena v. Sequoia Ins. Co.* (1987) 190 Cal.App.3d 1089, 1099.) The reason for dismissal is a question of fact to be determined at trial. (*Haight v. Handweiler* (1988) 199 Cal.App.3d 85, 89.)

In deciding whether the termination in this case was favorable to Cyprus Shore, we are guided by *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043. In that case, we held a malicious prosecution plaintiff failed to establish a probability of success to defeat an anti-SLAPP motion where the plaintiff in the prior action dismissed because it could not afford to continue litigating. The evidence was that Staff Pro Inc. faced substantial discovery expenses in the prior action and, after consulting with counsel, decided to voluntarily dismiss the case. (*Id.* at p. 1049.) Contemporary Services Corporation argued the dismissal was to avoid a deposition of Staff Pro Inc.’s president. The president submitted a declaration saying he had asked to reschedule the deposition when he woke up with the flu and was told by his doctor to stay in bed, and he had believed he was not well enough to attend a day-long deposition. We concluded “the record shows [the plaintiff in the underlying action] could not afford to pursue the matter, not that they had lost faith in the merits of their claims . . . or otherwise had reason to believe their claims would be unsuccessful.” (*Id.* at p. 1057.) The same is true here.

Osman failed to offer evidence Cyprus Shore dismissed its case for lack of merit or concern it would lose at trial. To the contrary, Adams declared Cyprus Shore believed its case was meritorious but settled because it was too expensive to go on. He said Cyprus Shore had spent approximately twice the amount set aside for litigation and “it could not afford to continue to litigate.” Without any contradictory evidence, we cannot say Osman showed a probability he could prevail on the favorable termination requirement of malicious prosecution.

Osman's several arguments for favorable termination are wide of the mark. He argues a voluntary dismissal is presumed to be a favorable termination on the merits. (*Sycamore Ridge Apartments LLC v. Naumann, supra*, 157 Cal.App.4th 1385, 1400.) But even if that were the case here the presumption would be rebutted by Adams' declaration, after which it had no further effect.

Osman contends Cyprus Shore's payment of \$100,000 to settle his cross-complaint shows it got nothing and had to pay to end the dispute, surely a victory for him. But the test is not which party obtained what it sought in the prior action. Rather, the issue is whether the settlement reflected Cyprus Shore's belief Osman was innocent of the misconduct it asserted, or instead a financial capitulation. The only evidence here is the latter. Even a party with a strong case may make an economic decision that settlement is cheaper than pursuing the matter to victory, and that is what the evidence appears to show in this matter.

Another contention is that Cyprus Shore never settled its action, but only Arndt's cross-complaint. But the record rebuts this. A review of the transcript of the settlement conference shows dismissal of Cyprus Shore's action was part of the deal. For example, at one point counsel for Cyprus Shore's lawyer summarized the settlement, explaining part of it was "Cyprus Shore is going to dismiss the entire complaint . . . for a prescriptive easement. [¶] . . . [¶] The Arndts are going to be dismissing their cross-complaint" So there cannot be any doubt Cyprus Shore dismissed its action as part of the settlement.

Osman also asserts there was no evidence dismissal of the case against him was a condition of the settlement with Arndt. But here again, he overlooks the record. In an opposing declaration, Tracy Ettinghoff, one of Cyprus Shore's attorneys, stated he dismissed Osman "pursuant to the terms of the settlement agreement" because "Christopher Arndt required the dismissal as part of the global settlement." So there

simply was no prima facie evidence the prior action terminated in favor of Osman.⁶

Since Osman failed to offer evidence it was probable he could establish the prior action terminated in his favor, the special motion to strike his malicious prosecution complaint should have been granted. The order appealed from is reversed with directions to enter judgment dismissing the complaint. Cyprus Shore is entitled to costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.

⁶ In light of our conclusion Osman did not show a probability of success on the favorable termination element of malicious prosecution, we do not reach the parties' arguments on the probable cause and malice elements of the cause of action.